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Attorneys for Defendant
PACIFICORP, an Oregon Corporation

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KLAMATH RIVERKEEPER, a nonprofit
public benefit corporation; **HOWARD**
McCONNELL; **LEAF G. HILLMAN**;
ROBERT ATTEBERY; and
BLYTHE REIS;

Plaintiffs,

v.

PACIFICORP, INC., an Oregon
Corporation;

Defendant.

CASE NO.: C 07-06199 WHA

**DEFENDANT PACIFICORP'S
OPPOSITION TO PLAINTIFFS'
ADMINISTRATIVE MOTION FOR
CLARIFICATION**

No hearing noticed

Judge: Hon. William H. Alsup

1 Defendant PacifiCorp opposes Plaintiffs' Administrative Motion for Clarification.
 2 Defendants believe the Court's Order is already clear, so no clarification is necessary. Indeed,
 3 the "clarification" that Plaintiffs seek is really just a complaint about the timeline the Court set
 4 for accounting for PacifiCorp's incremental costs and fees—Plaintiffs' counsel might like to
 5 know their particular exposure now, but the Court has already ordered that any accounting will
 6 happen at the end of the case. That timeline makes sense because much of the incremental work
 7 PacifiCorp may need to perform as a result of Plaintiffs' counsel's delay, and hence the amount
 8 of Plaintiffs' counsel's liability, will turn on events yet to come in this litigation. Therefore,
 9 there is no further clarification the Court can offer right now.

10 ARGUMENT

11 The Court was at pains in its original Order to describe the "reasonable defense
 12 costs and fees attributable to the delay" for which Plaintiffs' counsel will be liable if they
 13 proceed with *Riverkeeper*. In its Order, the Court described those costs and fees as "attributable
 14 to the delay," as "incremental," and as "by reason of the two-and-a-half month delay." Order at
 15 8. The Court has said the same thing three times; it is difficult to see what clarification it could
 16 offer. The test is a simple one: Plaintiffs' counsel will be responsible for all fees and costs that
 17 PacifiCorp would not have incurred **but for** the delayed filing of the separate *Riverkeeper* suit.

18 That "but for" question is a factual question that will depend on the nature of the
 19 work PacifiCorp's counsel has done so far to respond to the *McConnell* litigation, and the work
 20 they may do in the future to respond to the *Riverkeeper* litigation. Because that accounting
 21 depends in part on future events, many within the control of Plaintiffs' counsel, the Court quite
 22 sensibly ordered that "[t]he accounting for such costs and fees shall be at the end of the case."
 23 *Id.* That timing is, at bottom, what bothers Plaintiffs—the "clarification" they seek is actually an
 24 advance ruling on what the specific costs and fees are going to be (Will they include
 25 PacifiCorp's fees and costs in bringing the motion to dismiss *Riverkeeper* as duplicative? What
 26 about new discovery propounded by PacifiCorp that could have less expensively been
 27 incorporated in past discovery? What about responses to new discovery propounded by
 28 Plaintiffs that partly overlap with old discovery, but partly are new, and requires re-interviewing

witnesses and document custodians?). Many of these questions are impossible to answer without knowing what specific work PacifiCorp's attorneys ultimately will be required to do, and how it relates to work they did before the Court's ruling. There can be no clarity on those questions until the work is actually performed, so there is nothing for the Court to clarify now.

One area of work, however, can be addressed now. But for Plaintiffs' counsel's admitted failure to timely assert the RCRA claim, PacifiCorp would not have been faced with duplicative suits and moved to dismiss the *Riverkeeper* action. Nonetheless, Plaintiffs' counsel seek "clarification" that they would not be liable for PacifiCorp's fees and costs in bringing the motion to dismiss the duplicative *Riverkeeper* action. This simply does not fit the logic of the Court's Order: If any work was indisputably caused by Plaintiffs' delay, it was the motion raising that very delay as a basis to dismiss the suit! In a hypothetical world where Plaintiffs did not inexcusably miss the *McConnell* Case Management Order's deadline to amend, PacifiCorp's motion to dismiss never would have been written or even contemplated. If Plaintiffs had timely sought to amend their *McConnell* complaint, in all likelihood PacifiCorp would have stipulated to the filing of a properly drafted amended complaint—work that would have taken scarcely any time at all. The "incremental costs and fees" measured by the difference between those two scenarios works out to be PacifiCorp's costs and fees of bringing the motion to dismiss, minus the trivial fees PacifiCorp would have incurred in evaluating an amended *McConnell* complaint, and stipulating to its timely filing. That amount falls within the measure of "incremental" costs and fees, and under the Court's Order, Plaintiffs' counsel should be liable for those costs and fees if they proceed with *Riverkeeper*.

* * *

Plaintiffs Motion for Clarification should be denied.

Dated: February 27, 2008

Respectfully submitted,

LATHAM & WATKINS LLP

By: _____/s/

Benjamin J. Horwich

Attorneys for Defendant PACIFICORP